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In the Supreme Court of the United States

OCTOBER TERM, 1979

NO. 79-1144

~~Wilson P. Abraham Construction Corporation~~

v.

Texas Industries, Inc.,
Petitioner,

v.

Radcliff Materials, Inc., Jimco, Inc., and
OKC Dredging, Inc.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Texas Industries, Inc., respectfully petitions for a Writ of Certiorari to review the judgment entered December 26, 1979, of the United States Court of Appeals for the Fifth Circuit.

Opinions Below

The opinion of the United States Court of Appeals for the Fifth Circuit in *Wilson P. Abraham Construction Corp. v. Texas Industries, Inc.* (hereafter *Abraham*) (Appendix A) is reported at 604 F.2d 897. The opinion of the United States District Court for the Eastern District of Louisiana, which was unpublished, appears in Appendix B. Application for rehearing was denied on November 29, 1979.

Jurisdiction

The judgment of the Court of Appeals for the Fifth Circuit was entered on December 26, 1979 (Appendix C) and this petition was filed within 90 days thereafter. This Court's jurisdiction is invoked under 28 U.S.C. 1254 (1).

Questions Presented

Whether a defendant in a Federal antitrust case may seek contribution.

Statement of the Case

History of the Litigation and Course of Proceedings

On January 26, 1973, a grand jury sitting in the United States District Court, Eastern District of Louisiana, handed down criminal indictments charging Petitioner, Texas Industries and one of its employees, Radcliff Materials, Inc. and one of its employees, Jahncke Services, Inc. and one of its employees, and Jimco, Inc. with violations of 15 U.S.C. 1. The

indictments charged the existence of an unlawful combination and conspiracy in unreasonable restraint of interstate trade consisting of an agreement between the defendants to raise and stabilize the price of ready-mix concrete in the New Orleans area. The criminal proceedings were ultimately concluded upon the entry of *nolo contendre* pleas by each of the defendants.

On September 8, 1975, Wilson P. Abraham Construction Corporation instituted this action against Petitioner, Texas Industries, Inc. The complaint centers around alleged antitrust violations by Petitioner and its alleged coconspirators.

Interrogatories filed by Petitioner, and answers thereto, revealed that the unnamed alleged coconspirators included Jimco, Inc., Radcliff Materials, Inc. and Jahncke Services, Inc. Petitioner thereafter filed a third-party complaint naming Jimco, Inc., Radcliff Materials, Inc. and OKC Dredging, Inc. as third-party defendants. In the third-party complaint, Texas Industries sought contribution from the third-party defendants in the event it was found liable to Wilson P. Abraham Construction Corporation in the main demand.

Each of the third-party defendants filed motions pursuant to Federal Rule 12(b)(6) seeking dismissal of the third-party complaint contending that no right of contribution exists among alleged antitrust coconspirators under the antitrust laws of the United States.

Disposition in District Court

The District Court entered a Minute Entry on October 4, 1977 (Appendix C) granting the motions to dismiss filed by the third-party defendants and, on March 29, 1978, the Court entered an order expressly determining that there was no just reason for delay in the entry of judgment until final determination of all issues in this action, and directing the Clerk to enter the October 4, 1977 Minute Entry as a final judgment. In accord with the said March 29, 1978 order, final judgment was entered on March 29, 1978 dismissing Texas Industries' third-party complaint with prejudice.

Disposition in the Fifth Circuit

On April 5, 1978, Texas Industries timely filed its Notice of Appeal from the judgment of the District Court.

On October 16, 1979, the Fifth Circuit handed down its opinion affirming the District Court's dismissal of Petitioner's third-party complaint and holding that no right to contribution exists under the Federal antitrust laws. A petition for rehearing was denied on November 29, 1979, and judgment of the Fifth Circuit was entered on December 26, 1979.

Reasons for Granting the Writ

1. The *Abraham* Decision Creates a Split in the Circuits on the Question of Contribution and Denies Petitioner Equal Protection of the Laws

The decision of the Fifth Circuit Court of Appeals in *Abraham* presents an irreconcilable conflict between the circuits

concerning the issue on which review is sought.

The first appellant court decision involving the right of contribution under the Federal Antitrust laws was that of the Eighth Circuit in *Professional Beauty Supply, Inc. v. National Beauty Supply, Inc.*, [1] handed down February 27, 1979. The principal issue in that case was whether there is a right of contribution in an antitrust case.

Professional, a wholesaler of beauty supplies, alleged that National, also a wholesaler of beauty supplies, had demanded that La Maur, who was a manufacturer of beauty supplies, grant it, National, an exclusive dealership of La Maur's products. Professional contended this constituted monopoly or attempted monopoly in violation of the federal antitrust laws. National filed a third-party complaint against La Maur alleging, in part, that in the event it was found liable to Professional for violation of federal antitrust laws, it was entitled to contribution from La Maur to the extent of one-half the recovery. La Maur filed a motion to dismiss for failure to state a claim, which was granted, and the district court entered final judgment.

Reversing the district court, the Eighth Circuit held that under certain circumstances, a defendant in federal antitrust cases may be entitled to pro rata contribution from other joint tort-feasors. 594 F.2d 1182. The decision of whether a particular party is entitled to contribution was left to the trier of fact upon consideration of all of the circumstances of the case. 594 F.2d at 1186.

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1. 594 F.2d 1179 (8th Cir. 1979), *en banc rehearing denied* (April 17, 1979).

In *Abraham*, the Fifth Circuit Court of Appeals has adopted the opposite rule. Stating that the "sole issue is whether a right of contribution is available to an antitrust defendant under the antitrust laws", (604 F.2d at 899) the Court held that there is no such right. Firmly demonstrating the irreconcilable conflict between the two Circuits, the Fifth Circuit said this, with regard to the Eighth Circuit decision in *Professional Beauty Supply:*

> "Although we have carefully considered the arguments set forth in the majority's opinion, we are unable to agree that a right of contribution should be allowed among violators of the antitrust laws." 604 F.2d at 900.

Two other panels of the Fifth Circuit had the same issue under consideration at the time the *Abraham* decision was handed down and, on that issue, followed the *Abraham* ruling. See *In Re Beef Industry Antitrust Litigation,* [2] and *In Re Corrugated Container Antitrust Litigation.* [3]

On November 8, 1979, the Tenth Circuit Court of Appeals, considering the same issue, decided *Olson Farms, Inc. v. Safeway Stores, Inc.,* [4] and held that no right to contribution exists under the antitrust laws. The Court discussed *Professional Beauty Supply* in detail and then declined to follow it, citing the Fifth Circuit's decision in *Abraham* as support for its position.

Thus, only this Court can resolve the clear split now existing between the Circuits on this very important issue.

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2. 607 F.2d 167 (5th Cir. 1979).

3. 606 F.2d 319 (5th Cir. 1979).

4. 1979-2 Trade Cases (CCH) ¶62,995 (10th Cir. Nov. 8, 1979), *petition for en banc rehearing filed* (Nov. 23, 1979).

The federal antitrust laws were intended to apply, and must be applied, uniformly to all persons subject to those laws. The lack of similar treatment among persons seeking contribution from joint tort-feasors in an antitrust case, depending solely upon the Circuit in which the suit is filed, creates a clear and arbitrary denial to Texas Industries of the equal protection of the laws as guaranteed to it by the Fifth Amendment to the United States Constitution. [5]

2. The *Abraham* Decision is Inconsistent With This Court's Decision in, and the Apparent Underlying Rationale of, *Cooper Stevedoring Co., Inc. v. Fritz Kopke, Inc.*

This Court's most recent expression concerning contribution appeared in *Cooper Stevedoring Co., Inc. v. Fritz Kopke, Inc.*, [6] where it was observed that:

> ". . . a 'more equal distribution of justice' can best be achieved by ameliorating the common-law rule against contribution which permits a plaintiff to force one of two wrongdoers to bear the entire loss, though the other may have been equally or more to blame." 417 U.S. 111

Cooper Stevedoring involved admiralty law. An employee of a stevedore company sued the owner of a vessel for injuries he sustained when he fell into a gap between crates loaded by a second stevedore company, from whom the vessel owner successfully obtained contribution. The second stevedore company contended that the decision was in direct conflict with *Halcyon Lines v. Haenn Ship Ceiling and Refitting*

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5. The Fifth Amendment to the United States Constitution does not specifically contain an equal protection clause. However, this protection has been implied under the Amendment's due process clause. *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 95 S.Ct. 1225 (1975); *Schneider v. Rusk*, 377 U.S. 163, 168, 88 S.Ct. 1187 (1954); *Shapiro v. Thompson*, 394 U.S. 618, 641-42, 89 S.Ct. 1322 (1969); *Bollinger v. Sharpe*, 347 U.S. 497, 74 S.Ct. 693 (1954).

6. 417 U.S. 106, 94 S.Ct. 2174 (1974).

Corp., [7] where this Court had denied contribution from an employer who was statutorily immune from suit by the plaintiff.

In recognizing the right to contribution where there is no statutory immunity, this Court, in *Cooper Stevedoring*, explained its earlier ruling in *Halcyon* this way:

> "Confronted with the possibility that any workable rule of contribution might be inconsistent with the balance struck by Congress in the Harbor Workers' Act between the interests of carriers, employers, employees, and their respective insurers, we refrained from allowing contribution in the circumstances of that case." 417 U.S. 112

In thus restricting *Halcyon* to its peculiar facts, this Court, in *Cooper Stevedoring*, said that:

> "Indeed, it is fair to say that application of the rule of division of damages between joint tortfeasors in admiralty cases has been as broad *as its underlying rationales.* The interests of safety dictate where two parties 'are both in fault, they should bear the damage equally, to make them more careful.' " 417 U.S. 111. (Emphasis added.)

Although decided under admiralty law, the underlying rationale of requiring that where two are at fault, both should bear equal responsibility in order to make them more careful represents a clear expression of this Court's view on contribution. The Fifth Circuit's view is plainly inconsistent.

3. The *Abraham* Decision is Inconsistent with This Court's Decision in *Perma Life Mufflers, Inc. v. International Parts Corp.*

The Fifth Circuit's decision in *Abraham* is patently inconsistent with this Court's rejection, in *Perma Life Mufflers*,

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7. 342 U.S. 282, 72 S.Ct. 277 (1952).

Inc. v. International Parts Corp., [8] of the doctrine of *in pari delicto* (of equal fault) as a defense to an antitrust claim.

The principal question before the Court in *Perma Life* was whether plaintiffs in a private antitrust action can be barred from recovery by *in pari delicto*. The plaintiffs had operated Midas shops under sales agreements with Midas. Their complaint charged that Midas conspired with its parent corporation and two others in violation of the Sherman, Clayton and Robinson-Patman Acts. With respect to the Sherman and Clayton claims, the Court of Appeals held they were barred by application of *in pari delicto*, noting that the plaintiffs had enthusiastically sought the Midas franchises with full knowledge of the allegedly illegal terms of the franchise agreements, had made enormous profits, had eagerly sought additional franchises, and had voluntarily entered into additional franchise agreements while fully aware of the restrictions on products they could carry and on persons they could deal with, all of which they were now challenging as violations of the antitrust laws.

This Court disagreed with the Court of Appeals, noted that there was nothing in the language of the antitrust acts that indicated Congress wanted to make *in pari delicto* a defense to treble-damage actions, and concluded that:

> "The plaintiff who reaps the reward of treble damages may be no less morally reprehensible than the defendant, *but the law encourages his suit to further the overriding public policy in favor of competition.* A more fastidious regard for the relative moral worth of the parties would only result in seriously undermining the usefulness of the private action of a bulwark of antitrust enforcement." 392 U.S. 139 (Emphasis added).

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8. 392 U.S. 134, 88 S.Ct. 1981 (1968).

If, in order to further the objectives of the antitrust laws, a participant in an unlawful scheme is not precluded from suing other participants in the same scheme, and recovering damages caused in part by his own actions, that same participant should not be denied the right to seek contribution from the other participants in the event he is held liable for the same actions to some third party.

In *Abraham,* the Fifth Circuit Court of Appeals construed *Perma Life* narrowly, interpreting it only as a *partial* rejection of *in pari delicto* as a defense. In reaching this construction, the Fifth Circuit emphasized the fact that in *Perma Life* the culpable plaintiff was economically less powerful than the defendant and was not, in any meaningful sense, a voluntary participant in the illegal scheme.

Petitioner need not quarrel with the Fifth Circuit's narrow construction of *Perma Life* for even that narrow construction is patently inconsistent with its decision denying a right to contribution. Its construction of *Perma Life* recognizes, at the very least, that *some* participants in an unlawful scheme can file their own suit. Yet, its decision in *Abraham* is that *none* could file suit for contribution.

This Court should grant the writ to reconcile the two decisions.

4. The Fifth Circuit's Decision in *Abraham* is Inconsistent with One of the Basic Objectives of the Antitrust Laws

The objectives of the federal antitrust laws are threefold. They are designed to deter violations of the laws, to compensate victims of anticompetitive activities, and to deprive those who violate the laws from the fruits of their illegal acts.

The Fifth Circuit in *Abraham* reached its decision on the apparent premise that there is only one paramount objective, that of deterring violations. The Court did not address the other objectives of the antitrust laws.

This Court, on the other hand, has treated the three basic objectives of the antitrust laws as apparent equals. While determining the issue of whether indirect purchasers can recover under the antitrust laws in *Illinios Brick Co. v. Illinois,* [9] the Court said:

> "It is true that, in elevating direct purchasers to a preferred position as private attorneys general, the *Hanover Shoe* rule denies recovery to those indirect purchasers who may have been actually injured by antitrust violations. Of course, as Mr. Justice BRENNAN points out in dissent, 'from the deterrence standpoint, it is irrelevant to whom damages are paid, so long as some one redresses the violation.' *Post,* at 2082. But § 4 has another purpose in addition to deterring violators *and depriving them of 'the fruits of their illegality', Hanover Shoe, supra,* 392 U.S. at 494, 88 S.Ct., at 2232; it is also designed to compensate victims of antitrust violations for their injuries." (Emphasis added) 431 U.S. at 746.

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9. 431 U.S. 720, 97 S.Ct. 2061 (1977).

The importance of depriving the anti-trust violator of the fruits of his illegality was also recognized in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, [10] where it was said that:

> "In addition, if buyers are subjected to the passing-on defense, those who buy from them would also have to meet the challenge that they passed on the higher price to *their* customers. These ultimate consumers, in today's case the buyers of single pairs of shoes, would have only a tiny stake in a lawsuit and little interest in attempting a class action. In consequence, those who violate the antitrust laws by price fixing or monopolizing *would retain the fruits of their illegality because no one was available who would bring suit against them. Treble-damage actions, the importance of which the Court has many times emphasized, would be substantially reduced in effectiveness.* 88 S.Ct. at 2232 (Emphasis added)

Congress has already provided a great deterrence in that those found guilty of violating the antitrust laws will pay treble damages. In addition, a persuasive argument can be made that contribution enhances deterrence by ensuring that no one avoids liability.

However, the objective of depriving the tort-feasor of the fruits of his illegal acts can be assured *only* where there is a rule permitting contribution.

The denial of contribution would actually bring about a result totally anomalous to the very intent behind passage of the antitrust laws, which is to promote, encourage and protect competition. Permitting a plaintiff to shift total loss onto only one of multiple wrongdoers could, in many cases, deter and hinder competition by unduly burdening the one defendant with the whole loss.

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10. 392 U.S. 481, 88 S.Ct. 2224 (1968).

CONCLUSION

Petitioner suggests that the contribution issue involves questions of exceptional importance concerning federal law. The issue has not been, but should be, resolved by this Court.

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Dated, January 1980

CERTIFICATE OF SERVICE

Undersigned counsel for Petitioner certifies that service of this Petition for Writ of Certiorari has been made upon counsel for respondents this date, in accordance with law, by depositing three copies thereof in the United States Mail, postage prepaid, to the following persons:

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Appendices

APPENDIX A

WILSON P. ABRAHAM CONSTRUCTION CORPORATION, Plaintiff

v.

TEXAS INDUSTRIES, INC. and Frank T. Dooley, Defendants.

TEXAS INDUSTRIES, INC., Third-Party Plaintiff-Appellant,

v.

RADCLIFF MATERIALS et al., Third-Party Defendants-Appellees,

Jahncke Service, Third Party Defendant.

No. 78-1788.

United States Court of Appeals
Fifth Circuit

October 16, 1979.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before THORNBERRY, AINSWORTH and MORGAN, Circuit Judges.

THORNBERRY, Circuit Judge:

Texas Industries, Inc., the defendant in a civil antitrust action, appeals the dismissal of its third-party complaint impleading its alleged coconspirators and seeking contribution. The sole issue is whether a right of contribution is available to an antitrust defendant under the federal antitrust laws. We hold that there is no such right of contribution.

I.

This action was instituted on September 8, 1975, by Wilson P. Abraham Construction Corp., not a party to this appeal, against Texas Industries, Inc. [1] for damages arising out of an alleged price-fixing scheme. Abraham's complaint asserts that Texas Industries and certain unnamed coconspirators engaged in an unlawful combination and conspiracy to raise and stabilize the price of ready-mix concrete in the New Orleans area in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. [2] Abraham seeks to recover treble damages under 15 U.S.C. § 15.

Discovery instituted by Texas Industries revealed that the unnamed alleged coconspirators were Radcliff Materials, Inc., Jimco, Inc., and OKC Dredging, Inc. Texas Industries then filed a third-party complaint against these parties seeking contribution from them should it be found liable to Abraham in the main demand. The third-party defendants filed motions to dismiss the third-party complaint pursuant to Rule 12(b)(6) for failure to state a claim upon which relief could be granted.

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1. A former employee of Texas Industries, Frank T. Dooley, was named as a defendant but has never been served.

2. On January 26, 1973, a grand jury handed down criminal indictments charging Texas Industries and one of its employees, Radcliff Materials, Inc. and one of its employees, Jahncke Services, Inc. (later changed to OKC Dredging, Inc.) and one of its employees, and Jimco, Inc. with violations of 15 U.S.C. § 1. The indictments charged the existence of an unlawful combination and conspiracy in unreasonable restraint of interstate trade and, in particular, accused the defendants of entering into an agreement to raise and stabilize the price of ready-mix concrete in the New Orleans area. The criminal proceedings were ultimately concluded upon the entry of *nolo contendere* pleas by each of the defendants.

On October 4, 1977, the district court entered a Minute Entry granting the motions to dismiss the third-party complaint with prejudice on the ground that no right of contribution exists among antitrust coconspirators under federal law. Although persuaded by Texas Industries' arguments in favor of allowing contribution, the court deferred to what it considered the "weight of authority" [3] denying such a right to an antitrust defendant. On March 29, 1978, the court determined that there was no just reason for delay and directed that the Minute Entry be entered as a final judgment. Texas Industries appealed.

In their briefs and at oral argument the third-party defendants correctly asserted that no federal court had ever recognized a right of contribution among antitrust coconspirators. *See Olson Farms, Inc. v. Safeway Stores, Inc.*, [1977-

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3. The court cited four cases as holding that there is no right to contribution among coconspirators in a federal antitrust case. *American Motor Inns, Inc. v. Holiday Inns, Inc.*, 521 F.2d 1320 (3d Cir. 1975); *Walker Distrib. Co. v. Lucky Lager Brewing Co.*, 323 F.2d 1 (9 Cir. 1963); *Sabre Shipping Corp. v. American President Lines, Ltd.*, 298 F.Supp. 1339 (S.D.N.Y. 1969); *Wainwright v. Kraftco. Corp.*, 58 F.R.D. 9 (N.D.Ga. 1973). However, only the decisions in *Sabre Shipping*, which confronted the issue of contribution, and *Kraftco*, which arguably implies a no-contribution rule, are in point. The decisions in *American Motor Inns* and *Walker Distributing* only state the general rule that an antitrust plaintiff need not sue all coconspirators but may choose to proceed against any one or combination of them.

2] Trade Reg. Rep. (CCH) ¶ 61,698 (D.Utah 1977), *argued and submitted*, No. 77-2068 (10 Cir. March 16, 1979); *El Camino Glass v. Sunglo Glass Co.*, [1977-1] Trade Reg. Rep. (CCH) ¶ 61,533 (N.D. Cal. 1976); *Sabre Shipping Corp. v. American President Lines, Ltd.*, 298 F.Supp. 1339 (S.D.N.Y. 1969). [4] Unfortunately for the third-party defendants, however, the most recent, and only appellate, court to specifically consider this issue abruptly jettisoned the limited precedent and adopted the very position previously rejected by the district courts. In *Professional Beauty Supply, Inc. v. National Beauty Supply, Inc.*, 594 F.2d 1179 (8 Cir. 1979), an Eighth Circuit panel, with one judge dissenting, held that an antitrust defendant should, at least under certain circumstances, be entitled to contribution from those "joint tortfeasors" [5] not sued by the

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4. *See also Goldlawr, Inc. v. Schubert*, 276 F.2d 614, 616 (3d Cir. 1960) (dictum); *Baughman v. Cooper Jarrett, Inc.*, 391 F.Supp. 671, 678 n.3 (W.D.Pa.1975), *aff'd and modified on other grounds*, 530 F.2d 529 (3d Cir.), *cert.denied*, 429 U.S. 825, 97 S.Ct. 78, 50 L.Ed.2d 87 (1976) (dictum); *Gould v. American-Hawaiian S.S. Co.*, 387 F.Supp. 163 (D.Del.1974) (dictum); *Wainwright v. Kraftco Corp.*, 58 F.R.D. 9, 11-12 (N.D.Ga.1973) (arguably by implication); *Washington v. American Pipe & Constr. Co.*, 280 F.Supp. 802, 804-05 (S.D. Cal.1968) (arguably by implication). *But see Chevalier v. Baird Sav. Ass'n*, 72 F.R.D. 140, 145 n.6 (E.D.Pa.1978) (dictum).

5. The case law has uniformly characterized a private antitrust suit as a tort action. *See, e. g. Solomon v. Houston Corrugated Box Co.*, 526 F.2d 389, 392 n.4 (5 Cir. 1976); *Simpson v. Union Oil Co.*, 311 F.2d 764, 768 (9 Cir.), *rev'd on other grounds*, 377 U.S. 13, 84 S.Ct. 1051, 12 L.Ed.2d 98(1963); *Williamson v. Columbia Gas & Electric Corp.*, 110 F.2d 15 (3d Cir. 1969), *cert. denied*, 310 U.S. 639, 60 S.Ct. 1087, 84 L.Ed. 1047 (1940); *Tondos v. Amateur Hockey Ass'n*, 438 F.Supp. 310, 315 (N.Y. 1977); *Wolf Sales Co. v. Rudolph Wurlitzer Co.*, 105 F.Supp. 506 (Colo. 1952).

(Footnote continued on following page)

plaintiff in the main demand. Although we have carefully considered the arguments set forth in the majority's opinion, we are unable to agree that a right of contribution should be allowed among violators of the antitrust laws.

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5. (continued)

One commentator, however, has questioned the assumption that private antitrust actions sound in tort or that antitrust violators are necessarily "tortfeasors." Note, *Contribution in Private Antitrust Suits*, 63 Cornell L.Rev. 682, 692-97 (1978). As that writer notes, a large percentage of antitrust actions do not involve activity considered tortious under the common law. Since the no-contribution rule has traditionally applied only to joint tortfeasors, the writer suggests that the courts should carefully examine the nature of the particular antitrust violation to see what common law form of action most closely resembles the plaintiff's statutory claim. Because he concludes that price-fixing arrangements more closely resemble quasi-contract than tort, he apparently would award contribution in this case.

We cannot subscribe to this analysis. First, the focus of the antitrust laws is not so much on the defendant's unjust enrichment as on the injuries the plaintiff has suffered. In fact, the plaintiff's right to damages is totally independent of whether the defendant has profited at the plaintiff's expense. Thus, we cannot agree that price-fixing "more closely resembles quasi-contract than tort." Second, the anti-competitive activity which escaped liability at common law has, because of altered social and economic conditions, become unacceptable behavior in modern society. Indeed, conduct once non-tortious has become criminal under the antitrust statutes, It is difficult to believe that the law of torts, which has always been in constant flux, would not have eventually encompassed such conduct if legislation had not preempted the field. We believe that the same rationale justifying a no-contribution rule among "tortfeasors" applies to intentional antitrust violators. *See* Corbett, *Apportionment of Damages and Contribution Among Coconspirators in Antitrust Treble Damages Actions*, 31 Fordham L.Rev. 111, 114 (1962).

II.

There is no statutory right of contribution provided for under either the Sherman Act, 15 U.S.C. § 1 et seq., or the Clayton Act, 15 U.S.C. § 12 et seq. We do not, however, interpret this omission as evidence that Congress necessarily intended to deny contribution under the antitrust laws. *But see Sabre Shipping, supra,* 298 F.Supp. at 1345. It is more likely that this narrow question, although a matter of some importance, never occurred to the drafters of the legislation. Our task, therefore, is to guess what Congress "would have intended on a point not present to its mind, if the point had been present." [6] We agree with the case law that this issue must be resolved by reference to federal common law. [7]

Texas Industries advances a number of arguments for implication of a right of contribution. First, it argues that the deterrent effect of treble damages is dissipated by the possibility that only one of a number of conspirators would actually be liable for the injury. We conclude with prevailing economic

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6. B. Cardozo, The Nature of the Judicial Process 15 (1949).

7. *Professional Beauty Supply, Inc., supra,* 594 F.2d at 1182; *El Camino Glass, supra* at 72, 111 n.1; *Sabre Shipping Corp., supra,* 298 F.Supp. at 1343. *See generally Sola Electric Co. v. Jefferson Co.* 317 U.S. 173, 176, 63 S.Ct. 172 87 L.Ed. 165 (1942).

At common law no right of contribution existed among intentional tortfeasors. *Merryweather v. Nixan,* 8 Term.Rep. 186, 101 Eng.Rep. 1337 (K.B.1799). This no-contribution rule was subsequently extended to cases involving unintentional conduct, *see* W. Prosser, Law of Torts § 50 at 305-06 (4th ed. 1971), and was adopted by the federal common law. *Union Stockyards Co. v. Chicago, B. & Q. R.R.,* 196 U.S. 217, 25 S.Ct. 226, 49 L.Ed. 453 (1905). This rule, however, had been

theory, [8] however, that that very possibility of imposition of sole liability has an enhanced deterrent effect. The chance that a participant may be faced with a full judgment is more likely to discourage anticompetitive conduct than discourage anticompetive conduct than would ensuring that each participant pays only some fair share. Allowance of contribution in effect ensures that the burden upon a particular defendant

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7. (continued)
modified in some cases, at least among unintentional tortfeasors, *see, e. g., Kohr v. Allegheny Airlines, Inc.*, 504 F.2d 400 (7 Cir. 1974), *cert. denied*, 421 U.S. 978 (1975), and the Eighth Circuit has rejected the rule in its entirety in the antitrust context. *See Professional Beauty Supply, Inc. v. National Beauty Supply, Inc.*, 594 F.2d 1179 (8 Cir. 1979). The *Professional Beauty Supply* court relied upon *Cooper Stevedoring Co. v. Fritz Kopke, Inc.*, 417 U.S. 106, 94 S.Ct. 2174, 40 L.Ed. 2d 694 (1974), as indicative of the erosion of the no-contribution rule. Even assuming that *Cooper Stevedoring*, an admiralty case, is apposite, it would not be dispositive of the present case since the implication of a clause of action under the federal common law is a discrete inquiry focused upon the circumstances of a particular case.

8. Economists have argued that business managers, particularly in larger organizations, are general "risk averse" - that is, they are deterred more by the slight prospect of a large loss than by the strong prospect of a small loss. If this hypothesis is correct, application of the rule denying contribution should inhibit those managers who are aware of the rule from participating in unlawful group activity: Although the rule decreases the likelihood that an individual participant will be held liable, it increases the size of the potential liability.

Note, *supra*, 63 Cornell L.Rev. at 702. The author of the note suggests that the participant's unfamiliarity with the no-contribution rule may limit its deterrent effect. We are convinced, however, that, as a class, antitrust defendants are more likely to be familiar with the no-contribution rule than tortfeasors in general. Furthermore, the percentage of participants unaware of the rule will certainly decrease as the rule is applied.

would be ameliorated by a division of liability. *See Sabre Shipping Corp. v. American President Lines, Ltd.*, 298 F.Supp. 1339 (S.D.N.Y.1969); *El Camino Glass v. Sunglo Glass Co.*, 1977-1 Trade Cases ¶ 61,533 (N.D.Cal.1976). Even assuming, however, that the arguments concerning the relative deterrent effects are inconclusive, *see Professional Beauty Supply, Inc. v. National Beauty Supply, Inc.*, 594 F.2d 1179 (8 Cir. 1979) (Hanson, J., dissenting in part), this inconclusiveness would hardly be a compelling reason upon which to base a rule allowing contribution. *Id.* at 1189.

Second, Texas Industries suggests that a rule prohibiting contribution would encourage collusion by the plaintiff with one or more of the potential defendants to the action. Similarly, the Eighth Circuit expressed concern that under a no-contribution rule a large or powerful wrongdoer would have sufficient economic influence to coerce a plaintiff into excluding it as a defendant. Although the possibility of collusion or coercion has always existed under a no-contribution rule, the courts and legislatures have not deemed this threat sufficient to counterbalance the advantages derived from denying contribution to wrongdoers. Texas Industries has not suggested that there has been collusion or coercion in this case, and we are unwilling to assume that the plaintiff engaged in or yielded to these tactics. Should a defendant establish that it is the victim of such maneuvering, it may well have an independent cause of action, at least as against its coconspirators.

Third, Texas Industries contends that a rule denying contribution is inconsistent with the Supreme Court's rejection of *in pari delicto* as a defense to an antitrust action in *Perma*

Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 88 S.Ct. 1981, 30 L.Ed.2d 982 (1968). Texas Industries reasons that if a participant in an unlawful scheme is not precluded from recovering treble damages from the other participants, no possible rationale can justify the denial of his right to seek contribution from his fellow wrongdoers.

As an initial matter, we are unable to agree with Texas Industries' assessment of the Court's decision in *Perma Life*. Notwithstanding the language in Justice Black's principal opinion, [9] the decision does not endorse a wholesale rejection of the *in pari delicto* doctrine in an antitrust treble damages action. First, the Court made clear that the culpable plaintiff in that case was economically less powerful than the defendant and was not in any meaningful sense a voluntary participant in the illegal scheme. *Id.* at 139, 88 S.Ct. 1981. Consequently, the Court had no opportunity to decide whether a plaintiff might, wholly apart from *in pari delicto*, be precluded from recovery because of his "complete involvement" in the illegal scheme. *Id.* at 140, 88 S.Ct. 1981.

More important, five members of the *Perma Life* court emphasized their belief that some aspects of the *in pari delicto* doctrine should be retained under the antitrust laws. *Id.* at 146, 88 S.Ct. 1981 (White, J., concurring) (plaintiff barred where he and defendant bear "substantially equal responsibility" for injury); *id* at 147, 88 S.Ct. 1981, 1989 (Fortas, J., concurring in the result) (plaintiff barred where "the fault

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9. We therefore hold that the doctrine of *in pari delicto*, with its complex scope, contents, and effects, is not to be recognized as a defense to an antitrust action.

of the parties is reasonably within the same scale"); *id.* at 149, 88 S.Ct. at 1989 (Marshall, J., concurring in the result) (plaintiff barred where he "actively participated in the formation and implementation of an illegal scheme"); *id.* at 154, 88 S.Ct. 1981 (Harland, J., and Stewart, J., concurring in part and dissenting in part) (plaintiff barred who violated the law "in cooperation with defendant"). Subsequently lower court opinions have concluded that *Perma Life* refuses an *in pari delicto* defense only to those "plaintiffs who do not bear equal responsibility for creating and establishing an illegal scheme, or who are required by economic pressures to accept such an agreement." *Premier Electrical Constr. Co. v. Miller Davis Co.*, 422 F.2d 1132, 1138 (7 Cir.), *cert. denied*, 400 U.S. 828, 91 S.Ct. 56, 27 L.Ed.2d 58 (1970). *See Bernstein v. Universal Pictures, Inc.* 517 F.2d 976 (2d Cir. 1975); *Columbia Nitrogen Corp. v. Royster Co.*, 451 F.2d 3, 15-16 (4 Cir. 1971); *see also Javeline Corp. v. Uniroyal, Inc.*, 546 F.2d 276, 278-79 (9 Cir. 1976); *Dreibus v. Wilson*, 529 F.2d 170, 174 (9 Cir. 1975); ABA Antitrust Law Developments 297-99 (2d ed. 1975). [10]

Furthermore, the partial rejection of the *in pari delicto* defense in *Perma Life* does not require that we recognize a right of contribution among antitrust coconspirators. There is an obvious and fundamental difference between a

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10. In *Greene v. General Foods*, 517 F.2d 635, 646-47 (5 Cir. 1975), a panel of this court indicated that it "seriously question[ed]" the argument that *in pari delicto* retained vitality after *Perma Life*. That court, however, expressly did not rule on this point. *See also Kestenbaum v. Falstaff Brewing Corp.*, 514 F.2d 690 (5 Cir. 1975).

rule that bars suit by a plaintiff who in any way participated in the antitrust violation and a rule that forbids a defendant from obtaining contribution from his fellow wrongdoers. A rule barring any culpable plaintiff diminishes the deterrent effect of the antitrust laws by reducing the pool of potential private attorneys general who can instigate costly and uncertain antitrust litigation. However, as we previously noted, a rule prohibiting contribution among antitrust coconspirators not only does not frustrate deterrence but may very well enhance the statutes' deterrent effect by preventing a defendant from cutting its losses. [11]

Fourth, Texas Industries asserts that the denial of contribution in an antitrust context is inconsistent with the allowance of contribution under other federal statutes. A number of cases have recognized a right of contribution under certain provisions of the federal securities laws that do not expressly provide for such a right. *Gould v. American Hawaiian Steamship Co.*, 387 F.Supp 163 (D.Del.1974), *vacated on other*

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11. In a contribution action there is necessarily an antitrust defendant who is faced with potential liability to an injured plaintiff; deterrence does not suffer if contribution is denied since a real threat of liability exists for all participants in the illegal scheme - any one of them could have been selected as the defendant in the plaintiff's action. On the other hand, a rule that bars suit by any plaintiff who participated in the wrong will, in many instances, mean that no defendant will face liability since there is no plaintiff willing to bring the action - a result that clearly undermines the deterrence objectives of the antitrust laws.

grounds, 535 F.2d 761 (3d Cir. 1976); *Alexander & Baldwin, Inc. v. Peat, Marwick, Mitchell & Co.*, 385 F.Supp. 230 (S.D. N.Y.1970), *aff'd per curiam*, 442 F.2d 1376 (2d Cir. 1971); *de Haas v. Empire Petroleum Co.*, 286 F.Supp. 809 (D.Colo. 1968), *modified on other grounds*, 435 F.2d 1223 (10 Cir. 1970). As these cases have recognized, however, both the Securities Act of 1933 and the Exchange Act of 1934 make express statutory provision for contribution, [12] and the allowance of contribution in these cases can be explained under the general principle that the securities laws are to be administered *in pari materia*. *Globus, Inc. v. Law Research Service, Inc.*, 318 F.Supp. 955, 958 (S.D.N.Y.1970), *aff'd per curiam*, 442 F.2d 1376 (2d Cir. 1971); Fisher, *Contribution in 10b - 5 Actions*, 33 Bus.Lawyer 1821, 1826 (1973); Note, *supra*, 63 Cornell L.Rev. at 698 n.85. Since there is no express provision for contribution under the antitrust laws, we are unable to use cases decided under the securities laws as authority for implying such a right in this case.

As further evidence of a judicial trend toward contribution in other areas of federal law, Texas Industries cites both FELA cases [13] and sex discrimination cases decided under the

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12. Section 11(f) of the 1933 Act, 15 U.S.C. § 77k(f), and §§ 9(e) and 18(b) of the 1934 Act, 15 U.S.C. §§ 78i(e), 78r(b).

13. *Chicago & N.W. Ry. v. Minnesota Transfer Ry.*, 371 F.2d 129 (8 Cir. 1967); *Zontelli Bros. v. Northern P. Ry.*, 263 F.2d 194 (8 Cir. 1959); *Blair v. Cleveland Twist Drill Co.*, 197 F.2d 842 (7 Cir. 1952); *Patterson v. Pennsylvania Ry.*, 197 F.2d 252 (2d Cir. 1952).

Civil Rights Act. [14] The FELA cases were negligence actions in which contribution was allowed on the basis of state law and, therefore, do not support Texas Industries' argument that a federal right to contribution should be extended to an antitrust defendant. The cases decided under the Civil Rights Act do not even discuss the rationales for allowing contribution. We decline to discard an established rule of law by relying on cases that offer no reasons.

Finally, Texas Industries proffers that denying contribution amounts to a taking of property without due process and equal protection of the laws as guaranteed by the Fifth Amendment. This constitutional violation is premised on the supposed unfairness which results when an antitrust defendant is forced to bear a disproportionate share of the damages caused by the conspiracy to which he was a party. Although we realize that the denial of contribution among wrongdoers, together with a plaintiff's right to sue and collect from only one defendant, [15] can saddle a defendant with a

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14. *Stevenson v. International Paper Co.*, 432 F.Supp. 390 (W.D.La.1977); *International Union of Electrical, Radio and Machine Workers v. Westinghouse Electric Corp.*, 73 F.R.D. 57 (W.D.N.Y.1976); *Lynch v. Sperry Rand Corp.*, 62 F.R.D. 78 (S.D.N.Y.1973); *Gilbert v. General Electric Corp.*, 59 F.R.D. 267 (E.D.Va.1973).

15. Antitrust coconspirators are jointly and severally liable for all damages caused by the conspiracy to which they were a party. *Solomon v. Houston Corrugated Box Co.* 526 F.2d 389, 392, n.4 (5 Cir. 1976); *Wainwright v. Kraftco*, 58 F.R.D. 9, 11-12 (N.D.Ga.1973); *Washington v. American Pipe & Constr. Co.*, 289 F.Supp. 802, 804 (S.D.Cal.1968). A private plaintiff need not sue all coconspirators but may choose to proceed against any one or more of them. *Hennessey v. National Collegiate Athletic Ass'n*, 564 F.2d 1136 (5 Cir. 1977); *American Motor Inns, Inc. v. Holiday Homes Inc.*, 521 F.2d 1230 (3d Cir. 1975); *Walker Distrib. Co. v. Lucky Lager Brewing Co.*, 323 F.2d 1 (9 Cir. 1963).

substantial financial burden, we do not think the imposition of this burden offends constitutional principles.

The Fifth Amendment commands that the Federal government refrain from depriving a person of his property "without due process of law." Due process has both a procedural and a substantive aspect. Procedural due process ensures the observance of certain procedural safeguards designed to afford protection against arbitrary governmental deprivation. Under this analysis, property may not be taken without providing the minimal protections of notice and an opportunity to be heard. Texas Industries does not, and cannot, claim a procedural due process infringement. The judicial proceeding required before the treble damages penalty can be imposed goes far beyond the threshold requirement of procedural due process.

Substantive due process requires that all legislation be rationally related to the furtherance of a legitimate governmental objective. Since the close of "the *Lochner* era" [16] in the late 1930's judicial scrutiny of economic or social legislation has been virtually nonexistent. Instead, especially in the realm of economic regulation, the courts have exhibited great deference to legislative judgment and have upheld legislation if there is *any* rational basis for enacting a particular

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16. This phrase takes its name from the Supreme Court's opinion in *Lochner v. New York*, 198 U.S. 45, 25 S.Ct. 539, 49 L.Ed. 937 (1905), and refers to the period between 1897 and 1937 when the Court invalidated most state and federal legislation on substantive due process grounds. *See* L. Tribe, American Constitutional Law §§ 8-2 to 8-7 (1978); J. Nowak, R. Rotunda, & J. Young, Constitutional Law 397-410 (1978).

economic measure. *See, e. g., United States v. Carolene Products Co.,* 304 U.S. 144, 58 S.Ct. 778, 82 L.Ed. 1234 (1938). Indeed, the courts have even been willing to hypothesize legislative objectives and possible reasons for the law's enactment. *See, e. g., Williamson v. Lee Optical Co.,* 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563 (1955).

Texas Industries' substantive due process argument cannot survive in such a harsh climate. We have no difficulty in concluding that a rule denying contribution to antitrust coconspirators comports with the "mere rationality" test utilized by the courts to scrutinize economic legislation. Although denying contribution may create a more severe penalty under the treble damages provision of the antitrust laws than exists at common law, the powerful deterrent effect provided by such a penalty is certainly a rational basis for a no-contribution rule.

Texas Industries' equal protection argument is equally unacceptable. The equal protection guarantee of the Fifth Amendment's due process clause [17] requires that all

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17. Although the Fifth Amendment does not contain an equal protection clause, the protections guaranteed under that concept have, to a large degree, been implied under the amendment's due process clause. *See Weinberger v. Wiesenfeld,* 420 U.S. 636, 638 n.2, 95 S.Ct. 1225, 43 L.Ed.2d 514 (1975). ("This Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment."); *Schneider v. Rusk,* 377 U.S. 163, 168, 84 S.Ct. 1187, 12 L.Ed.2d 218 (1954); *Shapiro v. Thompson,* 394 U.S. 618, 641-42, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969); *Bolling v. Sharpe,* 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884 (1954).

governmental classifications rationally relate to a legitimate governmental purpose. The essence of the requirement is that the government treat all those similarly situated similarly. *See* Tussman & tenBroech, *The Equal Protection of the Laws*, 37 Calif.L.Rev. 341 (1949). In applying the equal protection rationality requirement, the courts have utilized various standards of review depending on the type of legislation being scrutinized. In reviewing economic regulation the courts have exhibited the same deference to legislative judgment accorded under a due process analysis. The test generally applied in such cases is whether there is any "conceivable basis" justifying the governmental classification. [18] Under this analysis, denying contribution does not deprive Texas Industries of equal protection of the law. The purpose of the antitrust laws is to preserve and promote the public interest in competition by ensuring the existence of an open and free market. We cannot say that a no-contirbution rule, because of its deterrent effect, is not rationally related to the achievement of this purpose.

III.

Throughout this opinion we have treated all antitrust defendants as equally culpable, and, therefore, equally undeserving of contribution. An argument could be made, however, that a distinction should be drawn between intentional and unintentional violators. The crux of this argument rests upon the conclusion that an antitrust defendant whose

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18. *See, e. g., McGowan v. Maryland*, 366 U.S. 420, 81 S.Ct. 1101, 6 L.Ed.2d 393 (1961); *Williamson v. Lee Optical*, 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563 (1955); L. Tribe, *supra* § 16-3.

liability is premised solely upon the illegal effects of its actions should not be treated as harshly as a defendant whose culpability arises from a determination of an illegal purpose. Even assuming that inequity may occur in a particular case, however, we believe that creating a contribution right for an unintentional violator may inimically affect the implementation of the antitrust laws. The possible detriments that can be envisioned make this an inappropriate case for the exercise of our power to shape the federal common law even to this limited extent.

First, allowing a right of contribution for an unintentional violator may diminish the deterrent function of trebled damages. As an initial matter, deterrence in reference to an unwitting price-fixer may appear to be irrelevant. We believe it reasonable to assume, however, that even businesses of the purest motives necessarily steer wide of any conduct the effects of which may violate the law, in the knowledge that full, trebled damages possibly await even an unintentional transgression. Allowing contribution may diminish this prophylactic, chilling effect by reducing the threatening spector of sole liability. Businesses may be encouraged to risk anticompetitive conduct secure in the knowledge that proof of illegal purpose is often impossible and that liability for illegal effects will be dissipated.

Second, the overall effects upon plaintiff's case of allowing contribution even for an unintentional violation are problematic. In *Professional Beauty Supply, Inc. v. National Beauty Supply, Inc.*, 594 F.2d 1179 (8 Cir. 1979), the court, in allowing contribution for all antitrust defendants, dismissed this concern by pointing out that district courts have considerable discretion in managing complex cases to diminish any adverse effects upon plaintiffs. However, as Judge Hanson, a district

judge sitting by designation, noted in his partial dissent, private plaintiffs may derive cold comfort from "the mere possibility of the favorable uses of district court discretion." *Id.* at 1190.

> Aware that litigation may spiral out of their control, it is forseeable that some plaintiffs will decide to forego a legitimate cause of action. Though district courts have the power to superintend complex litigation, the multiplication of issues and parties remains to be grappled with, and the chilling effect on the incentive to bring or pursue a lawsuit is unlikely to be diminished by the mere possibility of the favorable uses of district court discretion.

Id. at 1190. (Hanson, Jr., dissenting in part).

Similarly, a district judge in this circuit has rejected implication of third-party claims based upon his determination that such claim would be unmanageable. *See In re Corrugated Container Antitrust Litigation*, - F.Supp. - (S.D.Tex.1979). These concerns expressed by district judges buttress our conclusion that allowance of third-party claims may open a Pandora's box of procedural problems, against which district court discretion may prove a palliation.

Third, there appears to be no reason for drawing a distinction between intentional and unintentional violators other than to ensue equity in a particular case. There may well be antitrust violators who are entirely unwitting, but we refuse to distort the antitrust laws in order to remedy a problematic inequity. Moreover, any contribution may well amount to a windfall of sorts for a defendant because of the fortuity of plaintiff's proof.

IV.

Our decision in this case is certainly subject to reasonable contrary arguments. In this area of interstitial lawmaking, however, to forge a new rule with questionable benefits and such possible detriments is a bad practice. Those aggrieved by this decision always have recourse to Congress, a forum better suited to evaluation of the competing interests and policies involved. In the absence of more compelling arguments in favor of contribution, this court is reluctant to create such a right as a matter of federal common law.

Affirmed.

LEWIS R. MORGAN, Circuit Judge, concurring in part and dissenting in part:

I concur in the majority opinion insofar as it denies a right of contribution to defendants who have intentionally violated the antitrust laws. I dissent, however, from the determination that an unintentional violator [1] should be absolutely barred from seeking contributions from his fellow wrongdoers.

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1. Although intent is a necessary element of a criminal antitrust offense, a defendant may incur *civil* liability for an unintentional violation of the antitrust laws. *United States v. United States Gypsum Co.*, 438 U.S. 422, 98 S.Ct. 2864, 57 L.Ed.2d 854, 869 n.13 (1978). There is nothing new in this principle, for the courts have long recognized that "the *per se* rule against price fixing applies to any arrangement among competitors which, *in purpose or effect,* directly or indirectly inhibits price competition." L. Sullivan, Antitrust § 74 at 198 (1977) (emphasis added).

Historically, no right of contribution has been available among intentional tortfeasors. The courts have reasoned that limited judicial resources should not be wasted on a party whose cause of action is founded upon his own deliberate wrong. Restatement (Second) of Torts § 836A, Comment a (1979); Restatement of Restitution, Introductory Note to Ch. 3, Title C at 386 (1937). As noted in the majority opinion, Texas Industries has offered no convincing reason for departing from the common law no-contribution rule in the context of an intentional violation of the antitrust laws. What the majority fails to note is the modern trend toward recognizing a right of contribution among unintentional tortfeasors. Three fourths of the American jurisdictions [2] now agree with Dean Prosser's observation that

> [t]here is obvious lack of sense and justice in a rule which permits the entire burden of a loss, for which two defendants were equally, unintentionally responsible, to be shouldered onto one alone.

Prosser, Law of Torts § 50 at 307. Absent proof that the purposes of the antitrust laws would be frustrated under a

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2. Note, Contribution in Private Antitrust Suits, 63 Cornell L.Rev. 682, 698 (1978). A number of courts have allowed contribution among unintentional wrongdoers under federal common law. See, e. g., *Kohr v. Allegheny Airlines*, 504 F.2d 400 (7th Cir. 1974). *cert. denied*, 421 U.S. 978, 95 S.Ct. 1980, 44 L.Ed.2d 470 (1975); *Gomes v. Broadhurst*, 394 F.2d 465 (3rd Cir. 1967); *Knell v. Feltman*, 85 U.S. App.D.C. 174, 174 F.2d 662 (1949). The Restatement (Second) of Torts § 886A (1979) recognizes a right of contribution among unintentional tortfeasors.

limited contribution rule, I would, in the interest of fairness, award contribution to a defendant whose liability is based solely on an unintentional violation of the antitrust laws.

The majority suggests that awarding contribution to unintentional violators could undermine the antitrust law's effectiveness in discouraging anticompetitive behavior. According to the court's analysis, two problems arise even under a limited contribution rule: (1) the deterrent effect of the private damage action may be diminished if defendants are allowed to distribute the financial burden of a treble damages judgment and (2) the lawsuit will be made more complex and difficult to manage, thereby dissuading plaintiffs from bringing such actions. Neither argument is persuasive.

The deterrence argument has been relied on by courts as a reason both for denying and for awarding contribution in an antitrust case. *Compare El Camino Glass v. Sunglo Glass Co. with Professional Beauty Supply, Inc.*, 594 F.2d 1179 (8th Cir. 1979). The majority opinion favors the position adopted by the district court in *El Camino Glass* that denying contribution *enhances* the deterrent effect of the antitrust laws by preventing defendants from distributing the financial burden of a treble damages judgment. However, as the *Professional Beauty Supply* court noted, the argument can also be made that denying contribution *diminishes* the Law's deterrent effect by allowing some participants to avoid all responsibility for their wrongdoing. I agree with Judge Hanson's assessment that the arguments on either side of the deterrence question are at best inconclusive. *Professional Beauty Supply, Inc., supra*, 594 F.2d at 1189 (Hanson, J., dissenting in part).

The deterrence argument, therefore, is an inadequate reason for rejecting a rule designed to achieve fairness among parties guilty of no conscious wrongdoing.

Furthermore, even if one accepts the premise that a no-contribution rule has an increased deterrent effect on those contemplating anticompetitive activity, this is no reason for denying contribution to unintentional violators. As Assistant Attorney General Shenefield recently observed in testimony before a Senate subcommittee considering a proposed bill allowing contribution in price-fixing cases, [3] "[c]ontribution is most compelling where the tortious conduct is unintentional; *in such situations a lack of contribution would have no deterrent effect.*" [4] This position makes more sense than the court's conclusion that businesses will somehow "steer wide" of illegal activity which they never realized was illegal in the first place. Clearly, deterrence is a valid reason for denying contribution among those who *intentionally* violate the antitrust laws.

The court is also concerned that some businesses "may be encouraged to risk anticompetitive conduct secure in the knowledge that proof of illegal purpose is often impossible and that liability for illegal effects will be dissipated." Majority opinion at –, slip opinion at p. 420. The assumption that intentional violators will be able to pass themselves off as

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3. S. 1468, 96th Cong., 1st Sess. (July 9, 1979).

4. Testimony of Assistant Attorney General John Shenefield before Senate Subcommittee on Antitrust, Monopoly and Business Rights, June 8, 1979. Other writers agree that "denying contribution can consistently deter only willful lawbreakers; it will not inhibit many violations committed unintentionally or in response to economic coercion. Thus, the deterrence rationale provides at best a weak justification for blanket denial of contribution." Note, *supra*, 63 Cornell L.Rev. at 702-03; Restatement of Restitution, *supra*, at 386.

unwitting transgressors is inconsistent with the realities of the proposed contribution action. Any party seeking contribution will invariably be opposed by contribution defendants who have a vested interest in establishing that the contribution plaintiff was an intentional violator of the antitrust laws. Moreover, these contribution defendants, unlike many antitrust plaintiffs, will be in an excellent position to know whether the party was, in fact, an intentional wrongdoer. Under these circumstances few, if any, intentional tortfeasors will succeed in presenting themselves as unwitting transgressors.

In its second argument the court expresses concern that allowing contribution will make the lawsuit more complex and difficult to manage, thereby dissuading come plaintiffs from pursuing a legitimate cause of action. Although the authorities considering the question unanimously agree that permitting contribution does threaten the plaintiff's ability to control the size and scope of his lawsuit, [5] they disagree as to the trial court's ability to recognize and eliminate that threat. If is clear the Fed.R.Civ.P. 42(b) authorizes trial judges to order separate trials whenever a plaintiff is inconvenienced or prejudiced by a defendant's expansion of his suit. Relying on language from Judge Hanson's dissent in *Professional Beauty Supply*, the majority warns that the discretionary nature of the separation remedy may nevertheless dampen some plaintiff's enthusiasm about initiating an antitrust action.

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5. *Professional Beauty Supply, supra*, 594 F.2d 1184; *id* at 1190 (Hanson, J., dissenting in part); *El Camino Glass*, supra at 72,112; *Sabre Shipping Corp. v. American President Lines, Ltd.*, 298 F.Supp. 1339, 1346 (S.D.N.Y. 1969); Note, Contribution in Private Antitrust Suits, 63 Cornell L.Rev. 682, 700-01 (1978).

I simply cannot believe that the discretionary nature of the Rule 42(b) separate trials provision would discourage an antitrust plaintiff from seeking treble damages should the court recognize a right of contribution among unintentional violators. The district courts are certainly aware of the antitrust plaintiff's status as a private attorney general and of the important role played by the private damage action in enforcing the objectives of the antitrust laws. The special solicitude accorded these plaintiffs necessarily requires a liberal exercise of the separate trials provision. Realizing his favored position, the antitrust plaintiff is not likely to assume that the trial judge would deny separation and allow defendant to complicate the lawsuit or otherwise add to the private litigant's burden. Hence, the incentive to sue provided by the treble damages action is not jeopardized if contribution is allowed.

Although some unfairness to unintentional violators must be tolerated if antitrust law policy is thwarted by allowing contribution, I do not believe that the dangers envisioned by the majority withstand close scrutiny. Absent more convincing proof that a limited contribution rule would compromise the effectiveness of the antitrust laws, I would not force a defendant guilty of no conscious wrongdoing to bear total responsibility for the sins of many.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 78-1788

FILED DEC. 10, 1979
4:35 PM

D. C. Docket No. CA-7502820-"J"

WILSON P. ABRAHAM CONSTRUCTION CORPORATION, Plaintiff,

v.

TEXAS INDUSTRIES, INC. and Frank T. Dooley, Defendants.

* * * * *

TEXAS INDUSTRIES, INC., Third-Party Plaintiff-Appellant.

v.

RADCLIFF MATERIALS et al., Third-Party Defendants-Appellees.

Jahncke Service, Third Party Defendant

Appeal from the United States District Court
for the Eastern District of Louisiana

Before THORNBERRY, AINSWORTH and MORGAN,
Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern Distrrict of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that the third-party-plaintiff-appellant pay to the third-party-defendants-appellees the costs on appeal, to be taxed by the Clerk of this Court.

October 16, 1979

Morgan, Circuit Judge, concurring in part and dissenting in part.

ISSUED AS MANDATE: DEC. 7, 1979

DATE OF ENTRY: DEC. 26, 1979

APPENDIX C

MINUTE ENTRY
MITCHELL, J.
OCTOBER 4, 1977

FILED OCT. 5, 1977
4:58 PM

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

WILSON P. ABRAHAM CONSTRUCTION COMPANY	CIVIL ACTION
VERSUS	NO. 75-2820
TEXAS INDUSTRIES, INC., ET AL	SECTION "F"

This matter was submitted to the Court on a former date. After careful consideration of the applicable law, and of the briefs and arguments of counsel, the Court now rules.

IT IS ORDERED, ADJUDGED, AND DECREED that the motions of third-party defendants, OKC Dredging, Inc. (formerly Jahncke Services, Inc.), Radcliff Materials, Inc., and Jimco, Inc., to dismiss, be and the same are hereby GRANTED.

This complaint is filed under the Clayton Act to recover damages from defendants for their alleged violations of the Sherman Act. Plaintiff also alleges that defendants have violated the antitrust laws of the State of Louisiana. In March of 1977, the defendant, Texas Industries, Inc., filed third-party complaints against OKC Dredging (formerly Jahncke Services), Radcliff Materials, and Jimco, alleging them to be co-conspirators in relation to plaintiff's complaint.

All three motions to dismiss are based on the same premise - *i.e.*, there is no right to contribution or indemnity among coconspirators in a federal anti-trust case. All courts which have addressed this issue have decided in favor of movants' position. [1] Although we find third-party plaintiff's argument to be persuasive, we feel that the weight of authority dictates a contrary result.

Therefore, the motions are granted.

/s/ Lansing L. Mitchell

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1. *American Motor Inns, Inc. v. Holiday Inns, Inc.*, 521 F.2d 1230 (CA3-1975); *Walker Distributing Co. v. Lucky Lager Brewing Co.*, 323 F.2d 1 (CA9-1963), *appeal after remand*, 362 F.2d 1008 (CA9-196), *cert. denied*, 385 U.S. 976, 82 S.Ct. 507 (1967); *Sabre Shipping Corp. v. American President Lines*, 298 F.S. 1339 (S.D.N.Y.-1969); *Wainwright v. Kraftco Corp.*, 58 F.R.D. 9 (N.D. Ga.-1973).